JUSTICE 1 COMMITTEE

Tuesday 30 January 2001
(*Afternoon*)

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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CONTENTS

Tuesday 30 January 2001

JUSTICE 1 COMMITTEE
2nd Meeting 2001, Session 1

CONVENER

*Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Phil Gallie (South of Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

WITNESSES

Ian Allen (Scottish Executive Justice Department)
Niall Campbell (Scottish Executive Justice Department)
Jacqueline Conlan (Scottish Executive Justice Department)
Stuart Foubister (Office of the Solicitor to the Scottish Executive)
Donald Dickie (Safeguarding Communities Reducing Offending)
Susan Matheson (Safeguarding Communities Reducing Offending)
Jane Richardson (Scottish Executive Justice Department)
Gillian Russell (Office of the Solicitor to the Scottish Executive)
John Scott (Scottish Human Rights Centre)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 4

Scottish Parliament

Justice 1 Committee

Tuesday 30 January 2001

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:01*]

The Convener (Alasdair Morgan): I open the meeting, ladies and gentlemen. We will pass over item 1 on the agenda—declaration of interests—as Paul Martin is not here. Item 2 is brief and will be taken in private. I apologise to members of the public and press who are present, but I must ask them to leave for just a few minutes. We will welcome them back as soon as we can.

14:02

Meeting continued in private.

14:10

Meeting resumed in public.

The Convener: Item 3 on the agenda is to ask the committee to take item 8 in private. Do members agree to do so?

Members *indicated agreement.*

Convention Rights (Compliance) (Scotland) Bill: Stage 1

The Convener: The next item is continuation of our consideration of the Convention Rights (Compliance) (Scotland) Bill, for which we will again take evidence from the Scottish Executive. We welcome Niall Campbell, the head of the criminal and civil law group, Ian Allen, the head of the legal aid branch, and Gillian Russell of the office of the solicitor. Other representatives of the Executive are also available to answer questions as appropriate. I apologise for the poor accommodation in which we are forced to meet—in years to come, it can only improve.

We will resume our questioning more or less where we left off, after we have heard a general question from Phil Gallie, who was unable to be present at our previous meeting.

Phil Gallie (South of Scotland) (Con): I apologise for my absence from the previous meeting.

Section 29 of the Scotland Act 1998 provides that it is outwith the legislative competence of the Scottish Parliament to enact a provision that is

"incompatible with any of the Convention rights".

I understand that, at present, the sole arbiter in that matter is Sir David Steel, the Presiding Officer. No doubt he takes advice from those with legal minds. However, challenges could be made if he were to reject some element of a bill on the ground that it was incompatible with the convention rights. How might individual members or the Parliament as a whole address those challenges?

Niall Campbell (Scottish Executive Justice Department): Before a bill is introduced in the Scottish Parliament, it must be certified as competent. By definition, it must be compatible with the European convention on human rights. Gillian Russell will describe the procedure for establishing that.

Gillian Russell (Office of the Solicitor to the Scottish Executive): The minister who is responsible for a bill must provide a certificate to show that it is within the legislative competence of the Parliament. The Presiding Officer also must confirm that. I am not sure whether that answers your question.

Phil Gallie: Not really. The ultimate arbiter would be the European Court of Human Rights. If the evidence of either the minister or Sir David was disputed, where would individual members or the Parliament as a whole go if it was felt that a bill should proceed?

Niall Campbell: Are you envisaging a situation in which there is a declaration of competence although members believe that a bill is not competent?

Phil Gallie: No, the reverse.

Niall Campbell: The bill would not be introduced unless a certificate of legislative competence was produced.

Phil Gallie: It might be a member's bill.

Niall Campbell: I presume that such a bill would also require a certificate of competence. Have you not experienced that in the introduction of a committee bill?

Maureen Macmillan (Highlands and Islands) (Lab): Not so far.

Niall Campbell: That certificate would come from the authorities in the Parliament, not from Scottish ministers. Are you wondering what would happen if members did not agree with their assessment of the bill?

Phil Gallie: Yes.

Niall Campbell: I do not know the procedure that would be required, but we can find that out and write to the committee. The issue is what happens to a committee bill. We are clear about what happens to Executive bills: we have to certify them as competent. The issue is one for the Parliament.

The Convener: Excuse me for intervening, but I am struggling to understand how this discussion relates to the bill that we have before us.

Phil Gallie: The issue is fundamental to all bills.

The Convener: Our job is to scrutinise the bill that is before us. Are you saying that there is something missing from the bill? There is nothing in the bill that concerns the introduction of bills in the Scottish Parliament.

Phil Gallie: The bill is intended to make the Scottish Parliament compliant with the ECHR. It is in the interests of the bill that we clarify whether there is a fundamental question regarding the competence of the Parliament. We have already been given a satisfactory answer and we have been promised another answer that will clarify the issue. I do not understand your concern, convener.

The Convener: I shall let the discussion run just a little longer.

Niall Campbell: Mr Foubister, of the office of the solicitor, can perhaps add something.

14:15

Stuart Foubister (Office of the Solicitor to the Scottish Executive): A certificate of competence from the minister is required before Executive bills can be introduced. The Presiding Officer also must give his view on whether an Executive bill or a member's bill is within the Parliament's legislative competence. However, if the Presiding Officer's opinion is that a provision in a bill is not within the legislative competence of the Parliament, that does not prevent the bill from being introduced. The Presiding Officer must give his reasons for saying that it is not within the Parliament's legislative competence, but the member can still introduce their bill. However, if the Executive felt that a provision in a bill was not competent, it would refer the matter to the Privy Council, which would be the ultimate arbiter in that situation.

Phil Gallie: That answers my question for the moment.

Michael Matheson (Central Scotland) (SNP): Are the people who are involved in drafting the legal elements of the bill responsible for advising the minister whether it complies with the ECHR?

Stuart Foubister: In the Executive?

Michael Matheson: Yes.

Stuart Foubister: Not necessarily. The drafters are specialists.

Michael Matheson: They are referred to the Executive by solicitors such as yourselves.

Stuart Foubister: Yes. The instructing solicitors are involved.

Michael Matheson: So the people who advise what should be in the bill are those who certify it as compliant with the ECHR.

Stuart Foubister: Yes.

Michael Matheson: That is probably an argument for having a human rights commission.

Gordon Jackson (Glasgow Govan) (Lab): The Executive can refer a matter through the system to the ultimate arbiter, the Privy Council. However, if Phil Gallie had a disagreement—perish the thought—over whether a bill was within the Parliament's legislative competence, could he, as an individual member, refer the matter to the Privy Council?

Stuart Foubister: No. I am not sure what circumstance would arise. Mr Gallie would be entitled to introduce a bill that the Presiding Officer did not think was within legislative competence. However, if the Executive did not think that the bill was within legislative competence, it is likely that it would take steps either to amend it or to block it.

Gordon Jackson: I was thinking of the reverse situation. If a bill was introduced that Mr Gallie thought was not within the Parliament's legislative competence, could he—like the Executive—refer the matter to the Privy Council, to block the bill?

Stuart Foubister: No. However, the bill would be required to pass through the usual stages and, once it had been enacted, it could be challenged in court by an MSP as by anyone else.

The Convener: Let us return to our discussion of the way in which the Convention Rights (Compliance) (Scotland) Bill deals with legal aid.

Maureen Macmillan: At the previous meeting, officials were unable to give an estimate of how many courts, tribunals or statutory inquiries are likely to be affected by the bill. If a broad interpretation of the bill's provisions is intended, people taking part in tribunals such as Department of Social Security tribunals might qualify for legal aid. Can our witnesses tell us now which tribunals and other bodies or types of statutory inquiries the Executive considers are likely to be affected by the proposed extension of legal aid?

Niall Campbell: We are not able to do that today. We must consider separately each tribunal, the nature of its business, the sanctions that may be attached to its proceedings and the complexity of those proceedings, when deciding which will come on to the list of tribunals in which cases may be legally aided.

We could give the committee a list of all the tribunals in Scotland that might be covered theoretically, but that list would go well beyond the number that would fall under the shorter list and might be misleading. While that list would give you an idea of the range of tribunals, we would attach a strong health warning to it.

As soon as the process of examining the tribunals has been completed, Scottish ministers will come to the Parliament with the proposed regulations. I am sorry that we cannot give you the list that you requested today, for the reasons that I have outlined.

Maureen Macmillan: What criteria are ministers likely to prescribe for when the Scottish Legal Aid Board considers applications for civil legal aid in those additional proceedings?

Niall Campbell: The criteria will include the complexity of particular proceedings, whether there is a substantial question of law, whether the evidence is complex and whether there is a procedural difficulty. Those criteria will be applied to cases in order to see whether they qualify for legal aid.

Maureen Macmillan: How would you go about settling disputes over whether a case qualifies?

Niall Campbell: It is entirely for SLAB to decide whether legal aid should be granted in individual cases. Ministers play no part in those decisions. The decisions of SLAB, which is an independent body, may be challenged by way of judicial review.

Maureen Macmillan: Would SLAB decide whether a case involved a matter of civil rights or obligations?

Gillian Russell: Two issues are involved. First, one must decide in principle for which tribunals one would make legal aid available. The key factor in that decision is whether the proceedings could be said to determine civil rights and obligations—for example, whether there would be a loss of livelihood or reputation, or whether property rights were involved.

Secondly, once it has been decided in which tribunals legal aid will be available in principle, one must decide which tests will be applied in each individual case. That is where we will set criteria, which the board will apply to individual cases. Those criteria, which have been provided for already in employment tribunal cases, will involve the complexity of the proceedings and issues that relate to the individual applicant.

Maureen Macmillan: Would not the criteria include consideration of whether the tribunal was capable of having a case with civil rights implications brought before it?

Gillian Russell: That could be determinative of whether, in principle, legal aid would be made available. However, according to case law based on the European convention on human rights, we do not have to make civil legal aid available in all cases to which article 6 might apply.

The Convener: DSS tribunals do not qualify for civil legal aid or assistance by way of representation. Could a civil rights issue arise at a DSS tribunal?

Gillian Russell: If we were to take the view that DSS tribunals determined civil rights and obligations, one could say that, in principle, legal aid could be made available for them. However, one would then have to consider issues such as the complexity of the proceedings in the tribunal and whether legal aid should be made generally available to comply with article 6. All those issues are up for consideration.

The Convener: Some of my constituents would say that some of the matters that are discussed at DSS tribunals are very complex indeed.

If the Executive goes down that route, would the fact that social security is a reserved matter pose problems?

Gillian Russell: Our view is that legal aid is a devolved matter; it is for the Scottish Executive to

decide for which tribunals we would make legal aid available.

The Convener: That would be similar to the statutory instruments under the Terrorism Act 2000 that we will consider next week. Although that act is a reserved matter, legal aid in that respect is devolved. Is that right?

Gillian Russell: That is correct.

The Convener: We will move on to exceptional cases.

Michael Matheson: Section 7 of the bill will allow ministers to make regulations for exceptional circumstances in which someone who would normally attract legal aid on a fixed-payment basis would receive it time and line, as it is described. What exceptional circumstances could occur?

Niall Campbell: Such a provision might be justified for cases where, for example, there is a large number of witnesses, which makes precognoscing them—taking statements—more costly. In addition, if witnesses are at some distance, the cost of meeting them and taking a precognition is much greater. In such situations, legal aid might be provided outside the fixed-fee scheme.

Michael Matheson: So the exceptional circumstances will probably relate to the number of witnesses.

Niall Campbell: That is the most obvious example. Extreme complexity of the law might also create exceptional circumstances. The number of such cases is small. The policy memorandum mentions that the figure is 1 per cent of cases, which is about 500.

Michael Matheson: I see that the figure is 500. The explanatory notes say that the provisions will have a "modest impact" on the Legal Aid Board's expenditure. What does "modest" mean?

Ian Allen (Scottish Executive Justice Department): For each of the 500 cases, we pay about £500 or £600. The possibility of picking up only the more expensive cases, which run to £1,500 in solicitors' fees, will mean that figures of £250,000 to £500,000 are involved. In a budget of £130 million, such figures are relatively absorbable. We will have to consider that as the cases arise. Inevitably, costs will vary from year to year.

Michael Matheson: Will the amount that is available be capped?

Ian Allen: No.

Michael Matheson: Is the amount open ended?

Ian Allen: Time and line is open ended; the case just drops out of the fixed-payments scheme. The average cost of a case may be quite high because it includes counsel's fees and other outlays, but we are considering only the solicitors' fees.

Michael Matheson: Are you establishing a precedent? If time-and-line payments are allowed for exceptional cases, is not it just a matter of time before a challenge arises from another case for which a fixed payment of legal aid has been provided?

Niall Campbell: The intention is to provide flexibility to deal with the exceptional case. The regulations will establish the factors that should be taken into account and the Legal Aid Board will take the decision. If someone is unable to obtain representation under the provisions for fixed fees or exceptional cases, the bill will allow the Legal Aid Board to employ a solicitor directly to ensure that the person is represented and that the requirements of the European convention on human rights are met. We hope that we have provided a complete system of safety nets that will ensure representation in all circumstances.

Michael Matheson: I cannot help but feel that a challenge is likely at some point. My understanding is that there have been challenges over 40-odd cases.

Niall Campbell: Against the fixed fees?

Michael Matheson: Yes.

Niall Campbell: The cases that we are discussing are considered exceptional; the fixed fee does not provide adequate financial coverage for them. We are making an arrangement for such exceptional cases so that the payment will match the cost in solicitors' fees.

Michael Matheson: So all the challenges to date have involved exceptional cases.

Niall Campbell: The ground that has been used is that the fixed fees would not allow for proper representation.

Michael Matheson: Have all the challenges involved the number of witnesses and complexities in the law?

Ian Allen: Yes. The High Court decided that the concept of fixed payments was compatible, but observed that some hard cases exist. By introducing the exceptional powers, we feel that we will address the hard cases. Of course, the judicial committee of the Privy Council has still to consider that issue, which is under appeal.

Maureen Macmillan: I will follow up Michael Matheson's questions. In some rural sheriff courts, there have been difficulties in obtaining representation. I presume that the provisions would revisit that issue and would be used as a mechanism to sort out the many cases that are

exceptional because of distance and lack of representation.

Niall Campbell: The fixed-fees scheme makes provision for distant courts by allowing for an extra payment, particularly for cases that are heard in courts in the Highlands. An attempt has already been made to meet that need.

However, rural courts may have problems if a town does not have enough solicitors to provide representation in cases that may involve conflicts of interest. The arrangement by which the Legal Aid Board can directly employ a solicitor to provide representation is directed more at the rural problem than at problems such as a large number of witnesses or complexities of law, which would make a case exceptional.

Maureen Macmillan: So a case for which no solicitor was available would be exceptional.

Niall Campbell: Yes. If no solicitor were prepared to take up a case under the fixed-fees scheme, the Legal Aid Board's ability to employ a solicitor would provide a safety net.

14:30

The Convener: I will follow up Michael Matheson's question. Are retrospective challenges likely as a result of the bill? Time-and-line payments will be provided for cases that would have attracted only fixed fees. If someone feels that he was disadvantaged because the provisions were not enacted at the time that he went to court, does he have scope for a challenge?

Ian Allen: The bill includes provisions to disapply any of the criteria, to cover transitional cases, because we were concerned about that issue. When the regulations on exceptional cases are adopted, we expect to have to disapply some of the conditions to be fair to solicitors who could not keep the paperwork or did not know that that would be necessary, for example.

The Convener: What do you mean by transitional cases?

Ian Allen: If the regulations are adopted on 1 August, it is likely that 30,000 summary criminal cases will be in the system. It would be fair for those involved in such cases to be able to seek exception from the system and receive time and line. However, we must recognise that solicitors may not have been able to collect the paperwork and do all that was necessary during the six months for which such cases have been running, unlike those who are involved in fresh cases.

The Convener: My question related more to retrospective challenges from cases that were not transitional but had finished at the time when the regulations came into force.

Gillian Russell: Such challenges would be unlikely, because the point should have been raised when the case was in the court. That would be a matter for the prosecution. The McLean appeal has been out for some time. People are aware that the appeal court has said that, in exceptional circumstances, the legal aid system as it stands may not produce a proper result.

Michael Matheson: In response to a question asked by Maureen Macmillan, Niall Campbell said that if a solicitor in a rural area could not take on a case under the fixed-fee arrangement because of costs that would be incurred—costs for travelling to the court, for example—the case could be classed as exceptional. Is that correct?

Niall Campbell: Not entirely. The fixed-fees scheme already makes provision for an extra payment for any case at one of 10 or 11 courts, which are all in the Highlands and Islands. That payment recognises the extra costs of rural cases.

When I mentioned distance, I meant the distance that was travelled to see witnesses to take precognitions. That might be one factor. I hope that the extra payments take rural courts into account. If it is necessary to provide representation, the fallback position is the direct employment of a solicitor, rather than applying for time-and-line payments under the scheme for exceptional payments.

The Convener: Will you remind me how the estimate of 500 cases was arrived at?

Niall Campbell: We discussed the likely number of cases in the tripartite group with the Law Society of Scotland and the Legal Aid Board. The number is not precise. It is an estimate that seemed acceptable.

The Convener: Was it just plucked out of the air, or did you do a sample survey of so many cases and say, "That's one that might possibly have fallen foul"?

Niall Campbell: It was not done on a scientific sampling basis, but on the basis of judgment within the tripartite group.

Phil Gallie: I am probably running behind the pack on this issue of 500 cases, but why is there a need for what I would call retrospection, given that with respect to adult mandatory life sentence prisoners, previous judgments have said that there is no need for change?

Niall Campbell: Do you mean retrospection in the legal aid situation?

Phil Gallie: Yes, but is there not an element of retrospection in looking back at previous sentences when trying to establish levels of punishment and levels of risk to the public?

Niall Campbell: The sentence remains. There is

no change to the sentence of life sentence prisoners—it is life, and that remains unchanged. What is happening is that for all those who are still in prison, a period is being set for punishment and deterrence, which determines the point at which they go to a tribunal of the Parole Board for Scotland to be considered in terms of risk. The sentence remains unchanged, so there is no retrospection at all in that sense. I am not sure that I have answered your question.

Phil Gallie: Perhaps my question was not clear, but I did say that I am lagging behind.

The Convener: I am sure that you will catch up, Mr Gallie.

I wish to ask about article 14 of the ECHR, particularly with regard to discrimination. There is a different legal aid system in Scotland compared with the rest of the United Kingdom. Does that open us up to potential challenges on the grounds of discrimination? Have you had any discussions with the Lord Chancellor's Department about that?

Niall Campbell: Obviously, we keep the Lord Chancellor's Department in touch with what we are doing. There already are differences between the legal aid systems north and south of the border—for example, our fixed-fees scheme is not the same as in England—but they have the same objective, which is to ensure adequate representation to meet the tests of a fair trial.

Gillian Russell: The general rule on discrimination is that there must be an objective and reasonable justification for a difference in treatment. Our view is that as the UK Government has decided that it is appropriate for different administrative parts of the United Kingdom to decide how to make legal aid available, that in itself is the objective and reasonable justification for having differences north and south of the border. We think that we are doing what we need to do to meet our ECHR obligations, and we are doing it where it is within our competence to do so.

The Convener: You said that there are differences with the fixed-fees scheme in Scotland. Did you consider scrapping the system altogether, because I think that there were adverse reactions when it was introduced?

Niall Campbell: Clearly, if a scheme is challenged one looks at it carefully, but the fixed-fees scheme has various administrative advantages for both the lawyer and the Legal Aid Board in terms of the speed that applications can be dealt with. It also has delivered significant savings in the total cost of legal aid. For both those reasons, it is now an established part of the way in which legal aid is given in summary criminal cases. The objective of this bill is to make changes that will address the risk of incompatibility with the convention.

The Convener: I dare say that that is a subject that we may return to in our legal aid inquiry.

If there are no further questions on that section of the bill, we will move on to part 4, which deals with homosexual offences. I will ask the same questions that I asked about various sections last week. Which organisations were consulted on this provision, and how was the proposal received?

Niall Campbell: No organisations were consulted on this proposal to change the law, which flows directly from a Strasbourg judgment that said that the law was incompatible with the convention. If it would be helpful, we can make the judgment available to the committee.

The Convener: It would be helpful if you sent us a copy.

How many offences are we talking about in this category that is to be abolished?

Jane Richardson (Scottish Executive Justice Department): Not many. A difficulty arises from the way in which the Criminal Law (Consolidation) (Scotland) Act 1995 is constructed. Two offences are grouped together under section 13 of that act. In 1998, for example, 30 people were convicted under the broad offence, part of which we are proposing to repeal. In 1999 there were 11 convictions. We cannot split the convictions between more than two people taking part in homosexual activities and homosexual activity in public toilets, which is not being dealt with by this bill.

Gordon Jackson: If there are only 11 cases it would not be hard to work it out. You say that you cannot split them. If you had thousands of offences, I could see that providing the statistic would be difficult, but if you have as few cases as that, just picking up 11 summonses would tell you the answer.

Jane Richardson: The information came from our criminal statistics.

Niall Campbell: They are published statistics. Obviously, if one got hold of the case papers one could get the information.

Gordon Jackson: The numbers are so small that that would not be a difficult exercise.

Niall Campbell: Yes, they are small.

The Convener: Are there other similar provisions in law? In other words, are there instances where an offence for homosexuals is not an offence for heterosexuals, or is this the only problem that you will have with the ECHR in this area?

Niall Campbell: The European Court of Human Rights ruling was on the definition of privacy, so under the ECHR this was a matter of privacy

rather than sexual discrimination.

The Convener: Understood. Do members have any other questions on this provision?

If not, we will move on to part 5. I do not know if this will excite much interest. How often is the procurator fiscal of the Court of the Lord Lyon obliged to exercise his functions?

Niall Campbell: Very seldom. To give you some idea of the scale of the operation, the fees last year for the procurator fiscal of the Lyon court were £1,800, so the functions are not exercised frequently.

Maureen Macmillan: What does the procurator fiscal of the Lyon court do?

Niall Campbell: In effect, he performs the same role as a procurator fiscal. He prosecutes before the Lyon court in the kind of cases that the court deals with that are to do with grants of arms and coats of arms.

The Convener: I do not think that the committee wishes to pursue this matter.

Michael Matheson: Apart from asking whether we really need the Lord Lyon.

Phil Gallie: I have a question.

The Convener: Mr Gallie, do you wish a coat of arms?

Phil Gallie: The policy memorandum on the Convention Rights (Compliance) (Scotland) Bill states:

"This Bill amends the 1867 Act to allow for the appointment of the Procurator Fiscal to the Lyon Court to be made by the Scottish Ministers, who are independent of the Lyon Court."

If we are going to make Scottish ministers responsible for the appointment of the procurator fiscal, somewhere along the line will we not go back to the argument about who appoints temporary sheriffs?

Stuart Foubister: The point is that in the situation regarding temporary sheriffs, the objection was not to who appointed them, but to the lack of tenure. If memory serves, in Starrs v Ruxton the High Court said that there was nothing objectionable about the Lord Advocate making the appointment. What was objectionable was that the temporary sheriffs only held office for one year, and were renewed from year to year. So just as Scottish ministers continue to be involved in the appointment of the senior judiciary, we see nothing objectionable about the appointment of the procurator fiscal of the Lyon court.

Niall Campbell: He is not the judge in the court; the Lord Lyon is the judge.

Phil Gallie: I understand.

14:45

The Convener: We will move on to part 6, which deals with the remedial orders. Gordon, would you like to ask a question?

Gordon Jackson: I have some difficulties with this part, but I should immediately say that my difficulties may be more for the minister than for the officials.

The powers are sweeping, although, for what it is worth, someone might point out that the parallel UK powers are sweeping too. Would you accept that, if the Executive has those remedial powers, the Scottish Parliament is unlikely ever again to see a bill such as the Convention Rights (Compliance) (Scotland) Bill?

Niall Campbell: That would depend on the kind of situation that the Executive was trying to put right. The powers are there to deal with emergency situations in which it is necessary to do something quickly.

Gordon Jackson: Can I just stop you there? I have sympathy with what you say, but my difficulty is with one of the situations in which the powers that your policy memorandum lists would be required.

The first three situations relate to court decisions on compliance. I have no problem with that as that is a done deal—the courts have made a decision and the legislation must be dealt with. However, the fourth situation in which the remedial powers might be used relates to

"*Any provision in legislation or any function of the Scottish Ministers which is thought to be incompatible*".

That would mean that the powers could be used to make changes to other areas that the Scottish Parliament is examining, such as the Parole Board and the ways in which we deal with lifers.

We are being asked to give the Executive a subordinate legislation power that will mean that the Parliament will never again have the opportunity to examine the sort of provision that is in the bill that we are discussing today. What are your comments on that?

Niall Campbell: It would not be a question of the Parliament not being able to examine such provisions because the procedure allows a super-affirmative resolution procedure, which is already precedented in the Human Rights Acts 1998. The speeded-up procedure is what is different. The process of primary legislation is the same.

Gordon Jackson: Am I right in understanding that while the Rolls-Royce-style super-affirmative procedure allows more time for chatting and drafting, it does not give the Parliament power to amend what is proposed?

Stuart Foubister: That is correct.

Gordon Jackson: That means that the Scottish Parliament could be put behind the eight ball and face a choice between having to throw out a piece of legislation that it broadly liked or to accept it in full.

Stuart Foubister: That is not realistic. The basic provision for the non-urgent cases allows something like a 60-day period for comments to be made on a draft of a draft. If there is a strong view that something in the draft of the draft is unacceptable, that would be taken on board.

Gordon Jackson: Of course it can be taken on board. Ministers can always do what they want. However, am I right in saying that there would be no power in the Parliament to make that amendment?

Stuart Foubister: I think that you are correct in saying that. If ministers chose to progress the draft of a draft in spite of views that had been expressed, the Parliament's options would be to accept the legislation or reject it.

Gordon Jackson: Eventually, the Parliament would have to take all or nothing of what might be serious legislation.

Stuart Foubister: Yes.

Gordon Jackson: Given what you have said about the super-affirmative procedure and its 60-day period, why is that thought to be much quicker than emergency legislation that would allow the Parliament to deal with the necessary amendments in the normal way?

Niall Campbell: Under the proposals, there would be a fast procedure that would almost certainly be faster than primary legislation.

Gordon Jackson: Yes, but I am talking about the normal way.

Niall Campbell: The normal procedure would probably take less time than taking primary legislation through quickly, but not necessarily. Primary legislation must go through the three-stage process and the procedure that is proposed would be a much-compressed procedure.

The Convener: I understand why the Executive might want an emergency procedure, although I cannot see why any order under that procedure should not be time limited and have a sunset provision so that Parliament, if necessary, can re-enact the provisions with full parliamentary scrutiny. I am at a loss to understand why the Executive would want a remedial order procedure that you have just said might take more time than a piece of primary legislation, yet allows ministers to amend any act of Parliament that deals with a devolved issue.

Niall Campbell: I do not think that I said that it would be slower. I think that both the normal procedure and the fast procedure would certainly be faster than achieving the same result through primary legislation.

The Convener: Okay, it may be faster. Presumably that is the reason why the power is being made. I cannot believe that ministers are making the power because they want to avoid there being full scrutiny.

Niall Campbell: We are also conscious of the pressure on the legislative programme, which is full.

The Convener: Have you given any consideration to putting a sunset provision—"This order will expire after two years" or something—into the orders?

Stuart Foubister: One of the issues to bear in mind is that the sort of changes that might be made under the orders could be small. For the sake of argument, it might be that the absence of the provision for an appeal to be made to a sheriff in a particular administrative situation is all that is wrong with a piece of legislation. That can be remedied in legislative terms in short compass. The question is whether it is in any way inappropriate for that to be done by an order that persists for ever or one that persists until repealed in due course.

Michael Matheson: Stuart Foubister has partially answered the question that I wanted to ask. My understanding is that the primary role of the orders will be to amend pieces of legislation. I would guess that any bill that would be introduced to amend another piece of legislation in such a way would be small and not detailed.

Stuart Foubister: That is correct. In an ideal world, the power would not be used at all.

Michael Matheson: The likelihood is that, in this context, only small bills that could be dealt with in a short period would come before Parliament.

You mentioned earlier that you are conscious of the pressures on the legislative programme. However, in emergency situations, the Executive would decide how it prioritises its legislation and could take account of the pressure that way. That would prevent the need for the Executive to take on sweeping powers to pass orders that the Parliament might fundamentally disagree with.

Stuart Foubister: I continue to think that there are difficulties in relation to the urgent cases. I do not think that any lawyer would say that the ECHR is a black-and-white world; it is grey and we often do not know what will come up in advance.

Michael Matheson: In emergency cases, would the order lie for 60 days?

Stuart Foubister: In the middle course, there is a super-urgent procedure, if you like, which allows

the order to be made before it is laid in urgent cases.

Michael Matheson: In such cases, would the order have been made by the time it is considered?

Stuart Foubister: Yes.

Jacqueline Conlan (Scottish Executive Justice Department): The standard procedure is that there would be a 60-day period. However, an additional provision in the bill allows for ministers, in urgent cases, to go ahead and make the order. That provision, however, has a sunset clause.

Michael Matheson: Given that we now have the benefit of hindsight, having witnessed various cases in which challenges have been made on the basis of the ECHR, can you give me an example of a case in which the super-fast procedure would have been appropriate?

Niall Campbell: I cannot think of one offhand. To a certain extent, the bill before us today takes up all the things that need to be done at the moment. I do not think that it would be difficult to produce an example of anything that has been done so far that would have been done by this procedure.

Michael Matheson: That means that this procedure is for something that might happen; no previous case would suggest that the power is needed.

Niall Campbell: The background to the power is that, in Scotland, a piece of legislation that is found to be incompatible with the ECHR is immediately struck down. The human rights situation in Scotland is such that we might have to act much more quickly than England and Wales, which have a declaration of incompatibility and time to put through legislation to rectify a situation. The power would help us to avoid an impossible situation arising or the striking down of a piece of legislation.

Gordon Jackson: I accept that in urgent cases the court has made a decision that the matter had to be dealt with. I also accept that it will often be a small matter, but this provision gives the Executive power to do things that are neither urgent nor small. I trust the Executive implicitly, but I might not trust the next one or the one in 10 years' time. We must remember that we are making legislation for the long term.

Could you include provisions in the bill to define more closely when it would be appropriate to use the remedial powers? For example, I know that when the matter was being dealt with in England, the Lord Chancellor made a statement—you will be aware of this—in the House of Lords, which was recorded, about what we would and would not use the powers for. He said that we would not use them to infringe rights—all that kind of political stuff.

Could we add a little protection to the bill, to prevent it from becoming far too sweeping a power to give to a Government?

Niall Campbell: We cannot answer that question this afternoon. We would need to give it consideration. You will be seeing the Deputy First Minister in a fortnight's time; we will obviously report on the issue to him. I do not think that it would be for us to suggest that that could be done. Obviously, the Pepper v Hart statement that you mentioned is another possibility, for describing more fully in the proceedings on the bill how the remedial powers might be used.

Phil Gallie: Michael Matheson asked for an example. Would it be fair to say that the Ruddle bill was an example of the kind of matter for which this power could have been used?

Stuart Foubister: We can provide examples of the sort of thing that would be dealt with under the powers in the bill. The Ruddle situation would not have been, because it was not a human rights problem; it was a loophole in the existing domestic legislation. Temporary sheriffs could have been dealt with under the powers in the bill. It would have been for consideration as to whether that would have been an appropriate way to do it and whether the matter was sufficiently urgent; there was a gap of about a year between temporary sheriffs being removed and part-time sheriffs arriving.

Phil Gallie: Others have expressed concern over comments about pressures on the legislative process. The Parliament was set up to overcome that and to ensure that there is a democratic analysis of all legislation that is passed. This cuts across that basic premise.

Niall Campbell: There is still parliamentary scrutiny, as I have described. This power gives Scottish ministers powers that UK ministers already have under the Human Rights Act 1998. It allows that to happen in the Scottish Parliament so, to that extent, it is bringing the scrutiny here.

The Convener: I am sorry, but you are not seriously suggesting that the UK ministers are going to use this power to amend devolved legislation in Scotland, are you?

Niall Campbell: That power exists.

Stuart Foubister: The power is in the Scotland Act 1998. We would not know whether UK ministers would use it, but the power is there.

Michael Matheson: Could you refresh my memory? In the Regulation of Investigatory Powers (Scotland) Act 2000, did not we amend the powers—I should know this, because it was

my amendment that was accepted at stage 3—for ministers to make certain orders in exceptional circumstances, as the ministers were humble and decided that they would give up those powers because they had not produced an example of when they would require them?

Stuart Foubister: I am afraid that I do not know that act well enough to comment.

Michael Matheson: It meant that there was a distinction between the powers that ministers had in the Scottish and Westminster acts. I cannot remember exactly which powers were removed from Scottish ministers and which orders they were prevented from being able to make. That set a precedent for a situation in which ministers could not produce an example of when they would require powers. History seems to be repeating itself in the bill. We are yet again giving ministers powers when there is not a previous example of why they would be required.

15:00

Stuart Foubister: There is a distinction, which is that in the bill we are saying that these are powers to remedy ECHR incompatibilities. If we knew that those existed at the moment, we would remedy them in the bill. As I said, I do not think that the world of human rights is black and white. Issues might emerge in the future.

The Convener: Given the non-black-and-white nature of this world, what is in the bill are matters that you think are problems here and now. Are there any matters where you think there might be problems over the horizon?

Stuart Foubister: We are aware of the ones that are at present under challenge. The planning system as a whole is under challenge; court proceedings are pending, which might not be resolved for some time. Litigation is continuing on the confiscation of the proceeds of drug trafficking; the Privy Council has heard the appeal, but no decision has yet been made.

I am not conscious that we are aware of any matter that is looming.

The Convener: As members have no other questions for the witnesses, I thank Mr Campbell and his colleagues for their attendance on both occasions.

Our next witness is from the Scottish Human Rights Centre: John Scott is the chair of the centre. Members have a draft evidence paper from the SHRC; we can go straight to questions.

John Scott (Scottish Human Rights Centre): This is not an opening statement, but for the sake of completeness I will say that I am also a solicitor in private practice, dealing exclusively with criminal legal aid work, so I have experience of the fixed-fee system as a practitioner.

The Convener: To what extent were you consulted on the provisions in the bill? If you were, do you see the results of your efforts in the bill? What do you think about the bill?

John Scott: We were not consulted at all. When you were told last time round that letters had been sent out to various organisations, you were being told that at the same time as—or just after—the letters had gone out. We were expecting the bill earlier; it was originally due in September or October.

On the bill, we are happy with this way of proceeding. The alternative way of dealing with issues is what happened with temporary sheriffs. The challenge had been anticipated and expected for a long time; it came and succeeded, as had been predicted. The legislation—the Bail, Judicial Appointments etc (Scotland) Act 2000—followed that.

This is the right approach: to anticipate likely successful challenges and legislate in advance to avoid expensive court defeats. There are matters of concern, but broadly this is the right approach. I hope that this is not the last such bill that is proposed, as Mr Jackson suggested it might be—I agree with his suggestion on that.

The Convener: Are there matters that you think are likely to be the subject of challenge in the future, which we should be considering now?

John Scott: One matter that concerns me is Mr Campbell's comment at the end of his evidence that this is all that the Executive thinks might need to be amended. That cannot be right. I should be interested to know who conducted the audit.

My experience of different Executive departments suggests that some people and some departments are more attuned to the ECHR than are others—some do not yet have much idea about it. Slopping out is an example of that. I do not see why it could not have been included in the bill. It is likely that there will be a court challenge on slopping out and, because it is known that that is likely and because slopping out is unlikely to be defended on the basis that it is a way of treating people that is not degrading, the Executive and the Parliament could look at it, rather than wait for a defeat in the courts.

Gordon Jackson: Far be it from me to defend the Executive, as that is not what we are on committees for, but do you accept that there are some issues that are better left until there is a court decision? The law is an inexact science—which is how some of us have made a living at it, because no one knows the answers—so it is better sometimes to wait and see rather than

make a change that is not needed.

John Scott: I agree, and for the cases outstanding at present it is appropriate to wait and see. That is particularly true for the cases about which we still have to hear from the judicial committee, but there are other areas. I am not happy that the audit was carried out by the Executive with no consultation and that it then presented us with the bill, saying that everything that the Executive does, apart from what is in the bill and apart from the grey areas where there might be challenges and where there are differences of opinion, is ECHR compliant. I cannot believe that that exhausts all the problem areas, apart from those where there are good arguments on either side.

Gordon Jackson: That brings me to remedial powers, because the logic is that the Executive agrees with you. It must suspect that other areas will come out of the woodwork. You heard my comments earlier—can you give me your view on the concerns that I expressed?

John Scott: I cannot express the concerns that I have better than the committee has already done. I do not feel comfortable with the idea that it is up to the Executive to decide on the appropriate way to proceed—whether to use the powers that the Executive will be given in situations that it judges to be an emergency or whether to proceed by a normal legislative path. I do not think that that should be the Executive's decision.

Michael Matheson: You referred to the Executive undertaking the audit. Who do you think should have undertaken it?

John Scott: Along with other organisations in the voluntary sector, we think that there should be a human rights commission. That commission should have undertaken the audit. The commission should be a facility for members. That addresses a point made by Mr Matheson and Mr Gallie earlier. How is an ordinary MSP supposed to be able to find out whether there are ECHR issues that have been ignored or side-stepped by the Executive? I do not see that there is any way that MSPs can do that except through organisations such as mine. There should be a more reliable method, especially if the Executive is presenting certificates saying that everything is okay. How can MSPs challenge that if they have no access to decent, up-to-date, independent information?

Michael Matheson: So you would see an independent human rights commission fulfilling a pre-legislative, scrutiny role?

John Scott: Yes.

The Convener: We should move on to the specifics of the bill, first of all the punishment part of a sentence. I believe that Euan Robson has a question.

Euan Robson (Roxburgh and Berwickshire) (LD): Not on this part of the bill, but on part 2. Mr Scott, you say in your submission that you think that part 2 is necessary and welcome. I agree that it is welcome, but are there aspects of part 2 that you have queries about? Do you have a view on, for example, the termination of appointments? There is a six to seven-year span of appointment and an upper age limit of 75.

John Scott: I have no specific concerns other than that it is preferable to have a lower upper age limit than 75. What is said on improving the situation of the Parole Board and making it challenge-proof is probably right.

Phil Gallie: Returning to punishment, given the questions that have arisen about life sentences, do you think that a different approach might be for courts to work within a range of minimum to maximum sentences for every crime?

John Scott: I am not happy with the idea of minimum sentences or any situation in which the discretion of the court is fettered—at least, as long as there is the possibility of a judicial appointments board and we can begin to have greater confidence in the judiciary. If we are happy with the judges, it is best to leave them to decide, taking all circumstances into account. Maximum sentences might be different.

Phil Gallie: Would it then be better in every case for the judge or sheriff to determine a fixed period of sentence that the individual should serve for the crime committed?

John Scott: Do you mean a period that they would actually serve, as opposed to—

Phil Gallie: If they committed murder and the judge says 20 years, that is what they serve.

John Scott: That is what it is proposed will happen and currently happens, although such a minimum recommendation is now made only in a small number of cases.

Phil Gallie: That would be a result of the bill.

John Scott: Yes. It will happen in every case, so that in every situation where a life sentence is imposed for murder, what will be called the punishment part will be fixed. My only concern is that care will have to be taken to ensure that the punishment part does not edge upwards. At present, the average length of time for people serving sentences for murder is 13 years. There might be an expectation that courts should fix punishment periods that are longer than that. Care will have to be taken when the 500 or so hearings take place, and there might be appeals. If a punishment part is fixed that the prisoner is not

happy with, it is subject to appeal to the High Court.

The Convener: The policy memorandum says that it will be open to the judge in some cases to specify a period of years that could exceed the individual's life expectancy. Does it concern you that that is life without the possibility of parole?

John Scott: Such a case could happen and would be compatible with the ECHR. I am never comfortable with a situation in which no hope is held out of someone being rehabilitated, regardless of how long they live or whatever happens. I would prefer that power not to be used in that way, to fix a term for punishment that exceeded the reasonable life expectation of the person, but I cannot say that there would not be such a case or that it would never be appropriate.

Euan Robson: I would like to return to the question of transferred life prisoners. My understanding of section 3 is that the bill makes no provision for those who are transferred on a restricted basis, who remain subject to the jurisdiction from which they have been transferred. Nevertheless, once they are resident in Scotland and therefore in Europe, article 7 of the ECHR might apply, so do you think that there might be appeals from those who are restricted?

John Scott: That would depend on which country they had been transferred from. If it was outside the Council of Europe and not subject to the ECHR, I can see that there might be arguments in favour of that, particularly if one took into account article 14 and the right not to be discriminated against. There might be arguments for bringing such prisoners into line with a prisoner in the next cell.

Euan Robson: Clearly you would not want to discourage a transfer from a regime that had a bad human rights record. On the other hand, it is conceivable that there could be a challenge once such people were here. Do you think that we should amend the bill to encompass that situation?

15:15

John Scott: The convention applies to anybody in a country that is a signatory to the convention, so that might be necessary. There could be knock-on problems, as countries might consider no longer transferring prisoners to this country. A prisoner in this country has rights because he is in a country that is a signatory to the convention.

The Convener: Let us move on to part 3 of the bill. You may have heard my earlier question to the Executive about the nature of tribunals that were or were not covered by the provision of legal aid. In particular, I asked about DSS tribunals. Is that an area that might fall foul—if that is the right expression—of the ECHR?

John Scott: I agree with what you said about the complexity of proceedings at DSS tribunals—clients of mine have appeared before such tribunals. I got the impression that the Executive was not heading in that direction. I find it a bit disappointing that all that the committee was offered was a list of all the tribunals in Scotland. I cannot believe that the Executive has no idea of what tribunals it proposes to include. If it knows, why does not it let us have that list? If it has no idea, that is even more worrying.

Maureen Macmillan: What do you think should be included?

John Scott: That is an area that I did not have much time to examine. I cannot give the committee a wish list of tribunals that should have legal aid, but a starting point would be some information from the Executive. We could then spot the obvious omissions.

Maureen Macmillan: That is something that we may have to return to when we have had a chance to examine the matter in more detail.

The Convener: Another area in which the Executive was a bit vague was time-and-line and fixed-fee payments. The regulations will allow time-and-line payments in such circumstances as Scottish ministers "think fit". Is that sensible? If not, can you suggest something better?

John Scott: The problem in dealing with legal aid matters is that the difficulties most often arise in the regulations. Thereafter, solicitors have to battle with the Scottish Legal Aid Board to get payment. Whatever regime is set up in the first place, the accounting department at the Scottish Legal Aid Board seems to operate under different rules. The process is like a game of battleships. It has been improving recently, but it is not always possible to work out exactly where the battleships are.

The combination of the existing fixed-fees regime with what is proposed should take care of the sort of difficulties that the High Court anticipated. I do not think that there will be any further challenges to fixed fees. However, what the exceptional cases are and how they are defined will be the test. Again, it is disappointing that draft regulations have not been submitted at the same time as the bill. I thought that the Executive would have had some idea of the sort of situations that would be involved. Why cannot we discuss that at the pre-legislative stage?

Michael Matheson: The Executive gave two examples of exceptional circumstances; first, in relation to the number of witnesses and secondly, in relation to a complicated area of law. Another example could be the case of a woman who has been subjected to domestic violence—which we discussed only last week—and who needs civil

legal aid to go to court to take out an interdict. There can be delays in such a process, because there are many forms to complete. Could a case in which somebody had to get to court quickly to take out an interdict be classed as an exceptional case?

John Scott: Yes, although that would be in relation to civil legal aid in any case, to which fixed fees do not apply. The Legal Aid Board has to be sufficiently flexible in such situations to be able to deal with matters quickly. That is generally the case although, on the civil legal aid side, there are still problems of which the committee is aware, and of which it will become increasingly aware through other research that is being undertaken.

The Convener: If there are no other specific questions on legal aid, I turn to the matter—I asked the Executive witnesses about this—of other areas that have not been dealt with. The Executive witnesses suggested planning appeals. Would other areas be on your list; areas that might not be quite so far over the Executive's horizon?

John Scott: There are a few such areas, but I would prefer to take a bit more time to examine them in detail with my colleagues. We have not had very long to consider them. I am not convinced by the suggestion that the bill covers all the clear-cut, challengeable areas and I am not entirely convinced that the Executive necessarily thinks that. If it included certain things in the bill, it might invite earlier challenges and perhaps risk a run of bad luck.

The Convener: You are surely not suggesting that the Executive is acting on the basis of problems that it knows exist, but which it is keeping quiet about because nobody has noticed.

John Scott: It is very difficult to say, because the process that resulted in the bill's introduction was opaque.

The Convener: Currently, human rights and ECHR compliance in general are taking up a fair bit of the Parliament's time. I know that you have views on that. Do you think that the Parliament's—as opposed to the Executive's—mechanisms for handling that are as good as they might be? What suggestions would you make?

John Scott: That goes back to what I said about the human rights commission. The commission should be available as an independent resource for the Parliament as well as for other public authorities, and could feed into the whole process. Our vision is of a commission that would promote bills such as this, that would conduct an audit of Government departments and that would provide legislation for consideration by the Scottish Parliament's committees, rather than having the Executive examining it. If, effectively, the same people who draft legislation later certify a bill as ECHR-compliant, that does not seem to offer the degree of independence that one would want.

I note that the human rights commission was mentioned again yesterday, in the Executive's programme for government, but I would like to have seen more progress towards establishing the commission before now. The Northern Ireland Human Rights Commission is an example close to home of how such a commission can work. That commission has been operating for nearly two years, and I know that Professor Dickson will be producing a report on it. We do not need to look all around the world for examples to help us decide on the best way of proceeding.

The Convener: If no other members have questions for Mr Scott, I thank him very much for attending.

Our next witnesses are Susan Matheson, chief executive of Safeguarding Communities Reducing Offending, and Mr Donald Dickie, who is SACRO's senior policy and standards manager. I believe that Susan wishes to make a brief opening statement, which I ask her to keep brief.

Susan Matheson (Safeguarding Communities Reducing Offending): For clarity—people sometimes wonder where we are coming from, and SACRO is variously described in the media and elsewhere—we are a community safety charity. We seek to reduce conflict and offending and to increase community safety and the effectiveness of the juvenile and criminal justice systems. We work with offenders to reduce the incidence of crime and to alleviate its impact in society.

We appreciate being invited before the committee today, as this is the first opportunity that we have had to comment on the bill. We received the bill and the accompanying papers on 11 January for information only, and received the information about our attendance at this meeting only on 24 January. A longer period of preparation would have been welcome.

As our notes—which have already been circulated to members—say, SACRO broadly welcomes the bill, not only because it brings our legislation into line with the ECHR, but for a number of other reasons. It will introduce more consistency and clarity about the system and it will introduce openness about decision making in individual cases. It also makes the decisions apolitical.

We anticipate questions mainly on part 1 of the bill—but not on transferred life prisoners—and some on part 2. I will say a little more about whether the courts should be issued with guidance, but I do not want to anticipate members' questions.

The Convener: I was going to ask about consultation, but you have answered that question. As you know, we were unable to invite people to give evidence until we had the bill in front of us.

Euan, did you have some questions on part 1?

Euan Robson: No. I think that they have been answered.

The Convener: You are totally satisfied.

How do you feel about the punishment part of a sentence being left to the discretion of individual judges? What do you think of the guidance on the factors that judges should take into account?

Susan Matheson: We suggest that guidance notes should emphasise to the judges the fact that they are setting only the punishment part of a sentence, but not taking risks thereafter into account—that will be assessed by the Parole Board. That may be important, because in some other types of cases judges are required to assess risk. We must clarify what the bill requires judges to do. At the committee's previous meeting, Gordon Jackson questioned whether the bill would decrease flexibility because, in future, there would be no way into the Parole Board system prior to the end of the punishment part of the sentence. We must make it clear that the judges will be required to determine only the punishment part of the sentence.

We think that there is a case for drawing up principles and guidelines for courts in deciding the punishment part of the sentence, as it is a new requirement. In the past, only in extreme cases—about 5 per cent—have judges exercised that power. We feel that the judiciary could be asked to draw up guidelines to ensure some consistency in judges' approaches. We understand that the Scottish High Court sentencing information system will not be updated continuously until the end of 2002. Although we do not know when the 500 or so review cases will be conducted, it is likely that they will have been completed by the end of 2002.

I quote from the report of the Scottish Consortium on Crime and Criminal Justice, which says that

"most jurisdictions outside Scotland make use of some form of sentencing guidance; Scottish courts are the exception in their relative lack of framework for sentencing."

We are not asking for anything unusual, although it may be new in Scotland.

Donald Dickie (Safeguarding Communities Reducing Offending): The committee's previous discussion did not make explicit the fact that the custodial part of a sentence includes punishment and protection of the public. I emphasise—this needs to be made explicit—that a life sentence is still a life sentence. There is a minimum sentence—life—for people who commit murder. When, under the bill's proposals, they serve the custodial part of their sentence, there will be a mixture of punishment, which will be determined by a judge, and protection of the public, which will be determined by the Parole Board. The person will then serve the rest of their sentence in the community, but they can be recalled at any time—they do not have to commit a further offence—to serve the rest of their life sentence or part of it.

Phil Gallie: That is an interesting comment. Perhaps the public do not always perceive the situation in that way.

Does Susan Matheson approve of the existing practice of supplying guidelines to the courts, such as 20 years for the murder of a policeman or the sexual murder of a child? Is that the kind of sentencing on which she would look for guidance in future?

Susan Matheson: We felt that the flexibility that the bill proposes should be retained so that judges can examine all the circumstances of a case. It is appropriate that the 20-year sentencing policy no longer applies because it is not contained in legislation—it is not a statutory provision. One assumes that a judge would take into account the seriousness of the offence and all the other factors that would lead to the imposition of a longer sentence, if necessary.

Phil Gallie: I am a bit disappointed with that reply, given your earlier comments, because it seemed to me that that was precisely what you were asking for.

Susan Matheson: Do you mean that I was asking for the 20-year rule to be—

Phil Gallie: You were asking for greater guidance to judges on the kinds of sentences that should be laid down for specific crimes. That is what the bill does.

15:30

Donald Dickie: I agree with John Scott—from the Scottish Human Rights Centre—that the discretion of the High Court should not be fettered in these matters. Although judges have been entitled to fix minimum periods in more extreme cases, they have never been required to do so. Therefore it makes sense that, rather than depending purely on the results of appeals cases, they should begin to think about how they will go about sentencing, especially if they are to be confronted with a large number of cases at one time. It would be good if judges themselves determined the criteria that they would apply in fixing a minimum period.

Phil Gallie: In my previous contacts with

SACRO, it has always been emphasised to me that there are four elements to sentencing: punishment; deterrence; protection of the public; and rehabilitation of prisoners. Is SACRO's view that those elements, in particular rehabilitation, should no longer be considered by judges?

Donald Dickie: Rehabilitation falls into the hands of the Parole Board for Scotland, which determines what is necessary to protect the public. At what point is the risk sufficiently low to release a person into the community? I should say that I am a former member of the Parole Board—I am experienced in the kind of decision making that happens there—and part of our experience in SACRO is supervising lifers in the community. The Parole Board will take into account the sorts of things that will reduce risk and they are rehabilitative measures. It will ask questions such as, "Is there suitable accommodation? What is the attitude of people in the local community? What is the level of supervision? Will the long-standing drink problem be addressed?" Those questions are all connected with rehabilitation as well as risk. The Parole Board is charged with the time of release—the judge is not.

Gordon Jackson: Mr Dickie said that, in the past, judges were entitled to fix minimum periods but—I am not nit-picking; there is a reason for this—while they could make minimum recommendations, those were in no sense fixed periods. The point is that often people have been in jail—some still are—long after the period has expired. I think that it was possible for people to go to the Parole Board before the minimum period. In other words, the periods were recommended periods.

Now, the punishment period will be fixed in stone. There is no way to get to the Parole Board before the end of the minimum period. While I welcome the legislation, that might be seen as a slight downside. There will always be exceptional cases, for example in fixing a 15-year sentence for a 19-year-old, there might be many reasons why that should be reviewed as time goes on. Should there be a mechanism for greater flexibility? As I have said, even the recommended minima were flexible, but we are now setting in stone a long period which, as far as I understand it, cannot be varied.

Donald Dickie: I take that point. Obviously, Gordon Jackson is correct on the point of law. In many ways, the upside of the disadvantage that he mentioned is that everybody, including the prisoner and those who are planning for release, such as the Scottish Prison Service, will know at what point they can start planning and assessing the risk. The trouble at the moment is that one might go through a lengthy parole process and have a huge dossier of paper compiled by many people at great expense, after which the Parole Board might recommend release and suggest a provisional release date. However, a minister may then decide, for reasons that they need not elaborate on, that there will be no release. Nobody will know quite why the decision was made, but there might be an assumption that the minister thinks that the prisoner has not been in jail for long enough.

I agree that if the sentencing and risk criteria for the release of prisoners are separated, it will be difficult to bring those two factors together and to achieve the degree of flexibility that I think Gordon Jackson suggests.

Gordon Jackson: I agree, and I think that the upside is important. There is certainty; once the Parole Board decides, it has decided. I like that, and I see why prisoners would like it. Do you think there is a place for flexibility being built in for exceptional cases, rather than every case being set in stone?

Donald Dickie: The only analogous situation that I can think of relates to determinate prisoners. Judges currently have a role in assessing risk when they are empowered to make an extended-sentence order in certain categories of case, and a supervised-release order in other cases. A judge might think at the point of sentence that there will be risk when the guy gets out in X years' time—it will be a finite term—and can order additional supervision. Under such provisions, the judge's decision, which will be made through a supervised-release order, can be reviewed at the point of release. Something slightly analogous could be built into the system, but I have not thought of a mechanism to achieve that legally.

Gordon Jackson: Neither have I.

Susan Matheson: That is why we want to ensure that judges are clear about the fact that the courts should properly separate the punishment and risk elements of a sentence. That relates to what Mr John Scott of the Scottish Human Rights Centre said. We want to ensure that sentences do not get longer and longer. The report of the Scottish Consortium on Crime and Criminal Justice says that there is no evidence that tougher sentences have a significant deterrent effect. If we are to have a rigid system, it must be applied correctly. The Parole Board's assessment of risk must come in at the appropriate point.

The Convener: The Executive seems almost to be encouraging—or at least suggesting—that judges should, in certain cases, think about setting punishments that are longer than somebody's life expectancy, which is effectively a life sentence without parole. I am not sure whether the witnesses agree that judges should go down that road—I can guess the answer. If they went down

that road, would it be more honest to give judges the option of a sentence of life without parole?

Susan Matheson: I agree with Mr Scott on that. He was not comfortable with the idea of people having no hope. If the judges properly separate the punishment part and the risk element, and if they set the punishment part at an appropriate length, it should probably be applied no matter a person's age. On the other hand, if another rule was set, SACRO would have no problem with it; as long as a person had their risk assessed by the Parole Board before they were released, we would be sure about community safety. That is the important part.

The Convener: The Executive seems to be suggesting that the punishment element, apart from being determined by some tariff or by precedent, is also determined by life expectancy, which seems curious.

Donald Dickie: I presume—perhaps wrongly—that judges, when determining the punishment part of a sentence, will take account of all the circumstances of the case. That does not limit their ability to take into account the age of the offender. If somebody aged 75 committed a crime for which the judge thought the appropriate punishment was 20 years, it would be open to the judge to decide to reduce that period. I believe that a pretty small number of people would come into that category. I also suspect that not many people serve more than 30 years. However, some may never get out and might like to know that, rather than having to apply for parole every year. That is at least a possibility—I am speculating.

Phil Gallie: The bill is about human rights. Discrimination is something that human rights stands against, whether on the grounds of age or sex. You discussed consistency with respect to punishment. How, therefore, could a judge in any court determine a suitable term of punishment on the basis of age?

Donald Dickie: Each case will be considered individually by the judge. We are suggesting that a set of criteria be taken into account.

Phil Gallie: Would those criteria include age?

Donald Dickie: They could do.

Phil Gallie: Would not that cut across European conventions? We are not meant to discriminate on the ground of age.

Donald Dickie: I do not know.

Euan Robson: I want to ask about the constitution of the Parole Board, which is covered under part 2. Your submission says that you think that the changes are necessary. I read that you are just about content with, for example, the provision that fixes the term of someone's service on the board at six to seven years. What are your feelings on the age limit of 75 for members of the Parole Board? Are you content with that?

Susan Matheson: Again, we do not want to discriminate on the grounds of age. I think that that provision was included because retired judges are needed for the process—there is a case for that. Some people are more—how would one put it—competent at one age compared to another person. Having said that, much younger people might not carry out their duties effectively and some people aged 80 might be able to do so. A decision on somebody's appointment would have to be made somehow but, if there was no way to determine in an individual case, I presume that there would have to be some age limit.

Euan Robson: If that provision for an age limit of 75 years—as proposed in new paragraph 2C of schedule 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993—were removed from section 5(3) of the bill, would you have any difficulty with that?

Susan Matheson: No.

Euan Robson: Are you content with the provision for there to be just three people on the tribunal for removal of members of the Parole Board from office?

Susan Matheson: We have no difficulty with that.

Donald Dickie: We have no particular views on that.

The Convener: How does the Parole Board reach its decisions, particularly in its assessment of risk, which is and will be important? It strikes me that there is not much clarity on how precisely the risk is assessed. Does that need to be more in the public domain and to be more sharply defined?

Donald Dickie: At present, the Parole Board gives reasons for its decisions. It does so in some depth, typically with four or five reasons why parole has or has not been granted. There is a growing body of research literature and guidance on how to assess the risk of reoffending and the amount of harm that might come from that reoffending. Many people who give advice to the Parole Board—including psychologists, psychiatrists and, more recently, social workers—now receive pretty thorough guidance on the factors that should be taken into account.

To use the jargon, that includes static factors—those that do not change. They include the age at which somebody first started to offend. Gender is also a good predictor of reoffending. Criminogenic factors are also taken into account. To return to what I was saying about rehabilitation, such factors concern the likely circumstances into which a person will be released, including their

employment situation, family ties, housing and money—things that something can be done about.

The Parole Board takes all those matters into account, based on the evidence that is put before it in the parole dossier. That evidence can include what victims have had to say, but not their opinion on whether the person should get released. There are occasions when a letter from the family of a murder victim will give details of other members of the family who they think might be at risk on the prisoner's release. The Parole Board can take a wide variety of matters into account—anything that is put before it, in fact.

The Convener: Perhaps I am betraying my ignorance, but is that kind of information automatically sought? Is the victim automatically consulted?

Donald Dickie: No. I think the representative from the Executive told the committee that that does not happen. However, the policy is being reviewed and if the secretary of the Parole Board received such information in a letter, he would automatically put it before the board.

15:45

The Convener: Would you like to add anything else before we finish this part of our agenda?

Donald Dickie: I have had time to reflect on the matter of discrimination on the basis of age. I would argue that, if there is any, it is likely to be positive. For example, a judge might take into account the fact that someone was extremely old when they committed an offence and that the duration of the punishment would therefore have a more severe effect, as the individual would die sooner. Such age discrimination would not run counter to the European convention on human rights.

Phil Gallie: Would that lead to consistent sentencing?

The Convener: I suspect that positive discrimination for one side is negative discrimination for another side.

Phil Gallie: That is right.

The Convener: I thank the witnesses for their evidence.

Proposed Protection from Abuse Bill

The Convener: Our next item of business is the committee's proposed protection from abuse bill. Members will be aware that the Parliament agreed last week that we should proceed with the bill. They will have seen the lengthy correspondence that has been winging its way between me and Jim Wallace, the Minister for Justice. I draw members' attention to the letter that I received this morning, copies of which they will have received. Having read the letter twice, it seems that Jim Wallace is happy for us to proceed with the bill as it is, rather than wait for further input from the Executive. I take it that everybody shares my interpretation of the letter. We can now proceed as planned and instruct the drafting of a bill to give effect to the proposal that Parliament has approved. Does the committee agree to that?

Members *indicated agreement.*

The Convener: The non-Executive bills unit has told me that it expects to have a draft bill ready for the committee's approval before Easter, with a view to introducing the bill to Parliament shortly after the recess. Work has started but there is still much to be done. The unit must consult the Presiding Officer, who must say whether the bill is legislatively competent. I assume that there will also be ECHR considerations. We will be kept up to date on progress.

Births, Deaths, Marriages and Divorces (Fees) (Scotland) Amendment Regulations 2000 (SSI 2000/447)

The Convener: The next item on our agenda concerns subordinate legislation—the Births, Deaths, Marriages and Divorces (Fees) (Scotland) Amendment Regulations 2000. Members will have seen the draft note that was circulated with the regulations and will note that the Subordinate Legislation Committee raised a point about the gap between the regulations being made and their being laid before the Parliament, from 6 December and 20 December. Given that the regulations do not come into force until 1 April 2001, that is not a problem that I would get excited about. Do members share that view?

Gordon Jackson: My excitement is mounting.

The Convener: Are we agreed that no further action is required on the instrument?

Members *indicated agreement.*

Petitions

The Convener: We now move to item 7 on the agenda.

A note by the clerk on the first petition, which is petition PE89 from Eileen McBride, was circulated with members' papers. We suggest that we have probably gone as far as we need to on the petition, as the Minister for Justice has replied to the various points that we raised with him. We also suggest that we might monitor the implementation of part V of the Police Act 1997, which was of particular concern to the petitioner, as and when required. If appropriate, we will revisit the issue if a problem arises. Are members happy with that course of action?

Phil Gallie: I am not happy with Jim Wallace's response. Someone who submits an application to an employer has no details about the criminal record certificate that might be sent to the employer unbeknown to the applicant—the minister explained that such a situation might arise due to the likely volume of applications. I would have thought that a system could be implemented whereby an individual was informed if a certificate was sent. The individual could then choose either to withdraw his application or to support it with a statement indicating that he queried the detail of the certificate.

The Convener: Are you talking about something akin to an appeals mechanism, which the petitioner specifically asked about?

Phil Gallie: It is wrong that a bad report, based on unsubstantiated information, should be made up about an individual, particularly if it is passed on to other people without the individual knowing its content.

I accept the minister's comments about the delay that would be caused, but any individual caught up in the process would far prefer a delayed response to a quick one that worked to his or her disadvantage.

The Convener: The minister obviously believes that the delay would disadvantage a lot of people who would not be adversely affected by the certificates. We have put the petitioner's points to the minister on more than one occasion and we have seen his response. Do you wish to suggest further action in addition to what is in the clerk's note?

Phil Gallie: It would be easy for the minister—or whoever the application for a certificate is made to—to inform the individual concerned of the response that is being sent about him to whoever is inquiring about his employment prospects. It would be administratively acceptable and reasonable to do something like that.

The Convener: I suggest that I take the petition away to examine the points that Phil Gallie has made and to consider whether we can do anything further. I will bring it back to the committee next week with either a proposal for different action or the suggestion that we take the action proposed in the note from the clerk.

Phil Gallie: Thank you, convener.

The Convener: The second petition is PE265 from Mr George McAulay on behalf of the UK Men's Movement. This morning, some additional information—a letter from the Scottish Executive and an e-mail in response to that letter—was circulated to members. If members have not received the information, copies are available. Do members wish to comment on the petition?

Phil Gallie: The minister seems to have missed the petitioner's point about anonymity. I accept that, in most circumstances, the information that an individual has been charged with an offence is made public—that may be quite right. However, cases of rape or sexual offences are different, because the victim's identity is held back, particularly if the victim is a child. That does not happen in other criminal cases. Irrespective of whether a man or a woman is charged with rape or another sexual offence, there is justification for saying that the identity of the person charged should not be declared until he or she is found guilty.

The crimes of rape or sexual abuse of children are horrendous. Once someone's character is stained with such a charge, the dirt tends to stick even if the individual is later cleared. A few years ago, a lady in Ayr was charged with making false allegations of rape. The court found her guilty and sentenced her to community service, but that was too late for the accused. The pressures on him led him to take his life.

We all get hot and bothered about rape when we discuss it in the chamber—justifiably so, as it is an horrendous crime—but we must consider both sides of the situation. It would be worth writing to the Minister for Justice to make the point that, as far as anonymity is concerned, those crimes are different. A positive view should be taken of the petition and legislation should, if necessary, be considered.

Gordon Jackson: I have sat through more rape trials than I care to think about. I am not unsympathetic to Phil Gallie's comments. I accept that being accused of rape, indecency towards one's children or any other sexual offence is different from being accused of other crimes. There is a question of degree. Mud sticks. If one were accused of theft but then acquitted, the mud would still stick. However, I accept that being

accused of a sexual offence is different.

I have sat through cases where I thought that it was awfully unfair that someone's name was blackened in their community. Phil Gallie gave the example of the case in Ayr and it is foolish to pretend that such cases do not exist. However, I do not know how workable it is to preserve the anonymity of the accused in such cases, as one would be unable to mention the name of the accused until they were found guilty. Some people have done horrendous things and, quite properly, are convicted. The public interest might not be served if the press reported those cases by blanking out names day after day. It is difficult to strike the balance—I am wittering because I genuinely do not know the answer. I am not unsympathetic, but I am not sure that the proposal is workable.

For the sake of completeness, let me say that I do not think that the other three points mentioned in the petition take us anywhere. Making a false allegation of rape could be made a specific crime, but it is already the serious crime of seeking to pervert the course of justice. I am not sure how one would get accurate information for the petitioner's proposals at points 3 and 4. However, anonymity is a live issue and I see no harm in considering it further. I do not think that it is a silly point.

The Convener: The Public Petitions Committee took that position. It did not take points 2, 3 and 4 any further but wrote to the minister on the first point. The minister's reply is attached to the clerk's note.

16:00

Euan Robson: I might not have picked up Phil Gallie correctly. Was he saying that his concern is that if you identify the accused you might consequently identify the victim, or is his concern restricted to the disclosure of the identity of the accused? There may be circumstances where, if you identify the accused, there are implications for the victim. In that much more narrow sense, I would have some sympathy with Phil Gallie's concerns.

Gordon Jackson: It is quite unusual for that to happen, although I am not saying that it never happens.

Maureen Macmillan: Part of the problem is the salacious interest of the press in such cases. Mud sticks when somebody's name is blazoned across the tabloids. That does not happen when somebody local is charged with stealing something from Woolworth's. Mud may stick a bit in a small community, but we are talking about somebody having their life destroyed. Is there a case for restrictions on reporting such cases?

Michael Matheson: I raised the unusual situation that Euan Robson picked up on—which arose in a constituency case in Falkirk—when I questioned representatives from the Crown Office. The accused had been named and, as a result, people were able to identify the victim. Although the victim was not named, the local paper picked up on the case and it quickly became public knowledge. The attitude of the accused and their family towards the victim and their family changed entirely as soon as the case hit the news. The victim's family was victimised because the accused's family saw their son as having had his name blackened.

I agree with Gordon Jackson that there is an issue here, especially in relation to point 1. My concern is that we are missing other complicating factors. I am inclined to think that the committee should consider writing to organisations that work with rape victims to ask whether we should consider the first point only. With the other three points, it becomes too complex an idea—the main organisations would say right away that they were against it—but we could find out whether the first point would have wider implications. The committee might then be better informed about whether to ask the minister to consider the matter in more detail than he has considered it to date.

The Convener: We have written to the minister. There is no point in writing to him again, because we will get the same reply.

Michael Matheson: There is a victim-accused axis here. In certain circumstances, it may be possible to provide protection to the victim and their family by not providing the name of the accused.

The Convener: I undertake to consult the clerks and to draw up a list of organisations to which we can write. Members can suggest other people to whom we might write. Once we get the responses we can consider where to take it from there. Is that okay?

Members *indicated agreement*.

Phil Gallie: I am happy with that, but I point out to Gordon Jackson the difficulty in identifying false charges of rape, which do happen, as the instance in Ayr demonstrated. However, we are concentrating on the right issues, so I am happy.

The Convener: Phil Gallie also mentioned cases of abuse against children. We might put that in the melting pot as well.

The final item is to be taken in private, so I will filibuster for a minute while the public leave the room.

16:04

Meeting continued in private until 16:08.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178